Ting Sieh Chung v Hock Peng Realty Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-03–118 OF 2009

B

LOW HOP BING, MOHD HISHAMUDIN AND ABDUL WAHAB PATAIL JJCA

20 APRIL 2012

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Land Law — Restraint on dealings — Caveat — Removal of caveat — Assessment of damages for wrongful lodgment of caveat — Registrar's assessment set aside by High Court — Whether High Court judge erred in setting aside assessment and ordering re-assessment — Whether assessment of damages adequately supported by evidence — Sarawak Land Code (Cap 81) s 179 — National Land Code s 329

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Hock Peng Realty Sdn Bhd ('the respondent') had an alleged claim for RM250,000 against Ting Sieh Chung ('the appellant'). In order to secure its claim, the respondent had lodged a caveat on 26 houses on the appellant's land. By reason of the caveat the appellant was unable to develop his land or to dispose of the houses on the land. The appellant filed an action for the removal of the caveat. Some eight years later the Bintulu High Court held that the caveat had been entered without reasonable cause and ordered its removal. The High Court also ordered the respondent to pay the appellant damages, which were to be assessed by the registrar. The registrar assessed damages for the wrongful lodgment of a caveat as RM1,789,938.60. The appellant appealed against this assessment. On appeal the High Court judge set aside the registrar's assessment and ordered a re-assessment before another registrar. This was the appellant's appeal against that order.

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Held, allowing the appeal with costs of RM50,000:

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(1) It is settled law that 'actual damage' is actually one of the heads of damages which an aggrieved person such as the appellant in the present case could claim. Section 179 of the Sarawak Land Code, which is substantially equipollent to s 329 of the National Land Code, does not expressly or by necessary implication preclude or prohibit the plaintiff from claiming for damages, loss of profits or sale at a lower price so long as there was evidence to prove the damages or loss, arising from the entry of the caveat without reasonable cause, as in the instant appeal. In the present case, if the respondent had not entered the caveat, the appellant would have sold the houses on the land or charged them to a bank to raise funds for purposes of development (see paras 16–17).

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(2) The registrar's assessment of damages was adequately supported by his specific findings of fact as adduced by the appellant and that remained

unrebutted. Based on the evidence the High Court judge should have proceeded to hold that the appellant ought to be compensated by way of damages, particularly in the absence of any rebuttal evidence by the respondent. Hence the High Court judge had erred when he set aside the registrar's assessment of damages (see paras 18–19).

[Bahasa Malaysia summary

Hock Peng Realty Sdn Bhd ('responden') mempunyai tuntutan yang didakwa sebanyak RM250,000 terhadap Ting Sieh Chung ('perayu'). Supaya dapat menjamin tuntutannya, responden telah memasukkan kaveat ke atas 26 buah rumah di atas tanah perayu. Atas sebab kaveat perayu tidak dapat membangunkan tanahnya atau menjual rumah-rumah di atas tanah tersebut. Perayu memfailkan tindakan untuk pemotongan kaveat tersebut. Lebih kurang lapan tahun kemudiannya Mahkamah Tinggi Bintulu memutuskan bahawa kaveat tersebut telah dimasuki tanpa sebab munasabah dan memerintahkan pemotongannya. Mahkamah Tinggi juga memerintah responden membayar ganti rugi kepada perayu, yang mana akan ditaksirkan oleh pendaftar. Pendaftar mentaksirkan ganti rugi untuk kesilapan memasukkan kaveat sebagai RM1,789,938.60. Perayu merayu terhadap penaksiran ini. Atas rayuan hakim Mahkamah Tinggi mengetepikan penilaian pendaftar dan memerintahkan taksiran semula di hadapan pendaftar lain. Ini adalah rayuan perayu terhadap perintah tersebut.

Diputuskan, membenarkan rayuan dengan kos RM50,000:

(1) Adalah undang-undang nyata bahawa 'actual damage' adalah sebenarnya salah satu kepala ganti rugi di mana pihak yang terkilan seperti perayu dalam kes ini boleh menuntut. Seksyen 179 Kanun Tanah Sarawak, yang mana sebahagian besarnya sama dengan s 329 Kanun Tanah Negara, tidak secara nyata atau dengan implikasi yang perlu menghalang atau melarang plaintif daripada menuntut untuk ganti rugi, kehilangan keuntungan atau jualan pada harga yang rendah asalkan terdapat keterangan untuk membuktikan ganti rugi atau kehilangan, berbangkit daripada kemasukan kaveat tanpa sebab munasabah, seperti dalam rayuan ini. Dalam kes ini, jika responden tidak memasukkan kaveat, perayu mungkin telah menjual rumah-rumah di atas tanah atau mencaj rumah-rumah tersebut kepada bank untuk mengumpulkan dana untuk tujuan pembangunan (lihat perenggan 16–17).

(2) Taksiran pendaftar terhadap ganti rugi adalah disokong dengan wajar oleh dapatan spesifiknya mengenai fakta yang dikemukakan oleh perayu dan ia kekal tidak dipatahkan. Berdasarkan keterangan hakim Mahkamah Tinggi patut meneruskan dengan memutuskan bahawa perayu patut diberikan pampasan melalui ganti rugi, terutamanya dalam ketiadaan apa-apa pematahan keterangan oleh responden. Maka hakim

Mahkamah Tinggi telah tersilap apabila beliau mengetepikan taksiran ganti rugi pendaftar (lihat perenggan 18–19).]

Notes

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3990–4398.

Cases referred to

Lachaume v Brighton [1903] 3 SR (NSW) 475 (refd)
Mawar Biru Sdn Bhd v Lim Kai Chew [1992] 1 MLJ 336, HC (distd)
Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; ,[2010] 6 CLJ 857, FC (refd)
Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor [2003] 6 MLJ 279, HC (refd)
Raji Transport Sdn Bhd & Anor v Idayu binti Zulkafli [2004] MLJU 36,[2004] 5 CLJ 479, HC (refd)
Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd [2010] MLJU 1353,[2010] 9 CLJ 400, CA (refd)

Legislation referred to

National Land Code ss 329, 329(1)

Appeal from: Originating Summons No 24–47 of 2000 (High Court, Bintulu)

George Lo (Tai Choi Yu with him) (Tai Choi Yu & Co) for the appellant.
George Lim (Battenberg and Talma) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This appeal was lodged by the appellant ('the plaintiff') against the decision of the learned High Court judge who had set aside the learned registrar's assessment of damages at RM1,789,938.60 and ordered a re-assessment of damages before another registrar.

FACTUAL BACKGROUND

[2] In 1993, some 19 years ago, the respondent ('the defendant') lodged caveat No L3535/1993 ('the caveat') against 26 new houses owned by the plaintiff, purportedly to secure a claim of about RM250,000 against the plaintiff.

[3] Some 11 years ago ie in 2001, the Bintulu High Court held that the caveat had been entered without reasonable cause, and ordered its removal, and the defendant to pay damages to the plaintiff to be assessed by the registrar. The defendant's appeals, first to the Court of Appeal and then to the Federal Court, were dismissed and the decision of the High Court was affirmed.

[4] The assessment of damages took two years to complete. The plaintiff called seven witnesses, four of whom are experts. The defendant called only one witness ie the solicitor who did the conveyancing transaction, but did not call any witness to rebut the factual evidence adduced for the plaintiff.

[5] After evaluation of unrebutted evidence, the registrar made, inter alia, the following specific finding of facts:

(a) the plaintiff had obtained the relevant approval for the subdivision of the plaintiff's land for purposes of development, for which the plaintiff had obtained a loan of RM400,000 from Hock Hua Bank for operation funds or working capital;

(b) however, Hock Hua Bank refused to release the loan by reason of the existence of the caveat, as a result of which the plaintiff had to abandon the development project in 1998–1999;

(c) upon subsequent development, the sale prices of the houses were arrived at based on the published price indices for the year 1997 until it was removed by the court on 16 March 2001;

(d) when the caveat was removed, the prices of the houses were based on the published price indices for the year 2001 when there was sharp decrease, thereby contributing to the plaintiff's loss;

(e) the inability of the plaintiff to develop the land and to dispose of the houses earlier, by reason of the caveat, had caused the plaintiff to suffer damages; and

(f) the tenancy agreement for the houses was for a minimum period of three years with an open renewal of another 12 months, but was terminated due to the existence of the caveat.

[6] On appeal, the learned judge set aside the registrar's assessment and ordered a re-assessment before another registrar.

ANY ERROR BY LEARNED JUDGE?

[7] It is trite law that the specific finding of facts by the registrar as a trier of facts should not be disturbed by an appellate court such as the learned judge herein unless that finding was plainly wrong: See eg *Ming Holdings (M) Sdn*

Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857 (FC) paras 41–48; and my judgments in *Raji Transport Sdn Bhd & Anor v Idayu Zulkafli* [2004] 5 CLJ 479 (HC) pp 481–482; *Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd* [2010] 9 CLJ 400 paras 29–32 delivered for the Court of Appeal. This is a sound principle, because in the assessment of damages, the registrar had the benefit of an audio-visual advantage which is not shared by the learned judge. In the instant appeal, the defendant elected to call no evidence other than the solicitor who handled the conveyancing documents. The plaintiff's evidence remained unrebutted. The registrar has correctly accepted the evidence adduced for the plaintiff.

[8] Section 179 of the Sarawak Land Code (Cap 81) (s 179) provides for the consequences of entering a caveat without reasonable cause. It merits reproduction as follows:

> Person entering caveat without cause
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> 179
>
> (1) Any person lodging any caveat without reasonable cause shall be liable to make to any person who may have sustained damage thereby such compensation as may be just.
>
> (2) Such compensation as is referred to in subsection (1) shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

[9] Section 179 is substantially equipollent to s 329(1) of the National Land Code (s 329(1)) which reads:

> Compensation for wrongful caveats
>
> 329(1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

[10] In construing s 179, the learned judge relied on *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336 and *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [2003] 6 MLJ 279 and held that the plaintiff must prove 'actual loss' or 'actual damages'.

[11] It is useful for us the embark on a discussion of these two High Court judgments.

[12] First, in *Mawar Biru Sdn Bhd,* the issue before the Johor Bahru High Court concerned the assessment of damages for wrongful lodgment of caveat

under s 329(1). The facts there revealed that:

(a) that was no evidence of any property value loss; and

(b) there was no real loss in terms of interest since there was no money due in the first place.

[13] It is abundantly clear to us that in *Mawar Biru Sdn Bhd,* there was no evidence to support any award of damages. The facts are readily distinguishable from those in the instant appeal. Hence, we hold that *Mawar Biru Sdn Bhd,* is of no assistance to the appellant (the defendant) herein.

[14] Next, in *Quill Construction Sdn Bhd,* Abdul Malik Ishak J (now JCA) dealt with the compensation for the wrongful entry of a private caveat under s 329(1). His Lordship held at p 293 that an action against any person or body for lodging the private caveat 'wrongfully or without reasonable cause' would be in a situation where the entry of such private caveat or the failure to withdraw such private caveat would result in actual damage. The learned judge then referred to the dictum of Owen J in *Lachaume v Brighton* [1903] 3 SR (NSW) 475, at p 480 to the effect that the gist of the action is for damages that may arise from the wrongful entry of the caveat.

[15] Section 329(1) is also discussed in *National Land Code — Commentary* MLJ [1992] (2nd Ed), at p 766 by Judith Sihombing who opined that, in most cases, 'the loss resulting would be that the caveat had inhibited the sale of the land or caused it to be sold for a lesser price'.

[16] Having distilled the principles from the aforesaid authorities, we are of the view that 'actual damage' is actually one of the heads of damages which an aggrieved person such as the plaintiff herein may claim. Section 179 and similarly s 329(1) do not expressly or by necessary implication preclude or prohibit the plaintiff from claiming for damages, loss of profits or sale at a lower price so long as there is evidence to prove the damages or loss, arising from the entry of the caveat without reasonable cause, as in the instant appeal.

[17] Had the defendant not entered the caveat, the plaintiff would have sold the houses or charged them to a bank to raise funds for purposes of development. These are losses of opportunity arising from the defendant's entry of the caveat which had remained for some eight years before the court ordered its removal.

[18] We are of the view that the registrar's assessment of damages was adequately supported by his specific finding of facts based on the unrebutted evidence adduced before him.

[19] As a matter of fact, the learned judge had accepted that the development project 'was abandoned when the loan was not available', as a result of the defendant's caveat. The learned judge should have proceeded to hold that the plaintiff is entitled to the losses for which the plaintiff must be compensated by way of damages, particularly in the absence of rebuttal evidence by the defendant. Hence, the learned judge has erred when he set aside the registrar's assessment of damages.

CONCLUSION

[20] As there was an error on the part of the learned judge in ordering a re-assessment of damages before another registrar, we allow this appeal, set aside the order of the learned judge and reinstate the registrar's assessment and the quantum awarded.

[21] Costs of RM50,000 to the plaintiff here and in the court below. Deposit to be refunded to the appellant (the plaintiff).

Appeal allowed with costs of RM50,000.

Reported by Kohila Nesan